

Respondent asserts the ALJ exceeded her authority in granting temporary partial disability compensation at a preliminary hearing because K.S.A. 44-534a only grants an ALJ authority to award temporary total disability benefits and medical benefits. Further, respondent argues that claimant failed to file an application for hearing requesting temporary partial disability benefits after sending a notice of intent. Last, respondent

contends that claimant's condition was no longer temporary and, therefore, he was not entitled to either temporary total disability benefits or temporary partial disability benefits.

Claimant argues that the ALJ had authority to enter an order for claimant to receive temporary partial disability compensation. Claimant further contends that he filed a timely Application for Hearing but because of respondent's request for continuance of the preliminary hearing, claimant's employment status changed, making him eligible for temporary partial disability compensation rather than temporary total disability compensation. Claimant contends the evidence shows his psychological condition is not at maximum medical improvement and therefore his condition is still temporary rather than permanent.

The issues for the Board's review are:

(1) Does an ALJ have authority to grant temporary partial disability compensation at a preliminary hearing?

(2) Did claimant properly file an Application for Preliminary Hearing on the issue of temporary partial disability compensation?

(3) Does the Board have jurisdiction to decide the issue of whether claimant is temporarily totally or temporarily partially disabled from a preliminary hearing order? If so, did the evidence show that claimant was temporarily totally or temporarily partially disabled?

FINDINGS OF FACT

Claimant was a corrections officer at the Shawnee County Department of Corrections. On January 23, 2009, an inmate threw him over a railing, and he fell 15 to 20 feet, landing on some concrete stairs. He suffered a fractured skull, facial fractures, and cracked and bruised ribs. He has also suffered psychological problems as a result of the accident. As of the date of the preliminary hearing, he had been released from care by all the physicians caring for his physical injuries. However, several physicians have recommended that claimant have an EEG, which had not been done as of the date of the preliminary hearing.

Claimant was released by Dr. Joseph Sankoorikal from treatment for his physical injuries on December 21, 2009, at which time respondent stopped providing him with treatment or prescriptions. Because he is a veteran, claimant sought medical treatment from the Veterans Administration (VA) Hospital, where he received treatment and prescriptions for headaches and migraines as well his psychological problems.

Claimant has undergone psychological testing and treatment from Andrew Schauer, Ph.D., and George Athey, Jr., Ph.D. Dr. Schauer first saw claimant in March 2009 at the

request of respondent, at which time he released claimant to return to work as of April 1, 2009. Claimant apparently tried to return to work but was taken off work as of June 5, 2009. Dr. Schauer again released claimant to return to work at full duty on August 29, 2009. The last report in the record from Dr. Schauer was dated October 14, 2009, at which time he noted that claimant should follow up with neuropsychological testing in April 2010 and consider returning to counseling if his mood did not improve. Claimant admits no authorized treating physician has taken him off work after he was released by Dr. Schauer. Dr. Athey saw claimant at respondent's request in May 2009 and again on August 24, 2010. Dr. Athey also opined that claimant was in need of further psychological testing and treatment.

Dr. Bernard Abrams, who saw claimant on April 14, 2010, at the request of claimant's attorney, stated that claimant had not reached maximum medical improvement psychologically, and also stated that claimant was in need of future medical treatment with continued counseling and neuropsychological evaluation.

At the time of the preliminary hearing, claimant continued to receive treatment from the VA Hospital for his psychological problems. Claimant testified that as long as he is taking his medication, his psychological condition remains stable.

Claimant was terminated by respondent in October 2009, while he was still under medical treatment for his physical and psychological injuries. His last day of work for respondent was on October 9, 2009. He was placed on administrative leave with pay for seven days. He did not work October 10 through October 30, 2009. From October 31, 2009, to October 29, 2010, he worked at Security Transport Services.

Claimant's attorney sent respondent's attorney a seven-day demand letter on April 21, 2010, asking for medical treatment pursuant to Dr. Abrams' report of April 17, 2010. The demand letter also stated: "Additionally, if temporary total disability results from any medical treatment that would be authorized or Court ordered, we would also be requesting temporary total disability." Claimant's Application for Preliminary Hearing was filed on June 22, 2010, when he was working for Security Transport Services. The preliminary hearing was originally scheduled for August 17, 2010, but was continued until November 9, 2010. By November 9, 2010, claimant was no longer working for Security Transport Services. Claimant became employed at the Kansas Juvenile Correctional Facility on November 15, 2010. The hearing was continued one more time and was held on December 14, 2010. In the hearing, claimant was seeking temporary total disability benefits from October 16, 2009 to October 30, 2009, at the weekly rate of \$474.73 and temporary partial disability benefits from October 31, 2009, to October 29, 2010, in the total amount of \$18,465.42.¹

¹ See P.H. Trans., Cl. Ex. 1.

PRINCIPLES OF LAW

K.S.A. 44-534a(a) states in part:

(1) After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. . . .

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings,

and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 44-510e(a) states in part:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.³

ANALYSIS

Respondent contends that the ALJ was without jurisdiction to award claimant temporary partial disability compensation at a preliminary hearing because K.S.A. 44-534a only refers to a preliminary award of temporary total disability. Respondent acknowledges that the Board has previously held that the ALJ's authority to award temporary total disability compensation at a preliminary hearing also gives the ALJ authority to award temporary partial compensation because the purpose of temporary total disability and temporary partial disability compensation is the same, *i.e.*, wage replacement before the claimant reaches maximum medical improvement and before the case is ripe to proceed

² K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

³ K.S.A. 2010 Supp. 44-555c(k).

to a final award.⁴ But as respondent points out, those Board decisions were entered before the Supreme Court's decisions in *Casco*⁵ and *Bergstrom*⁶.

When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.⁷

When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.⁸

Accordingly, in keeping with the recent mandates of the Kansas Supreme Court, this Board Member now holds that K.S.A. 44-534a does not confer authority upon an ALJ to award temporary partial disability compensation at a preliminary hearing. The Workers Compensation Act only provides for temporary partial disability compensation in K.S.A. 44-410c, K.S.A. 44-510e and K.S.A. 44-510f. As such, the ALJ's authority to award temporary partial disability is limited to the time of the final award. This Board Member is aware that this determination runs counter to prior Board decisions and to the "temporary" nature of temporary partial disability compensation and its purpose as wage replacement.⁹ Nevertheless, the jurisdiction and authority of an ALJ and of the Board is controlled by statute. If the authority is not in the Workers Compensation Act, then it does not exist. The ALJ's award of temporary partial disability compensation is reversed.

Based upon this finding, the second issue concerning the alleged procedural defects is moot. As for issue No. 3, whether claimant's condition is temporary or permanent, that

⁴ See, e.g., *Cox v. American Disposal Services*, Docket Nos. 1,020,204 & 1,021,901, 2006 WL 546167 (Kan. WCAB Feb. 10, 2006); *Brown v. Lawrence-Douglas County Board of Health*, Docket No. 205,848, 1996 WL 167237 (Kan. WCAB Mar. 29, 1996).

⁵ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

⁶ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

⁷ *Casco*, 283 Kan. 508, Syl. ¶ 6.

⁸ *Bergstrom*, 289 Kan. 605, Syl. ¶ 1.

⁹ Cf. *Antwi v. C-E Industrial Group*, 5 Kan. App. 2d 53, 612 P.2d 656, *aff'd* 228 Kan. 692, 619 P.2d 812 (1980).

is not an issue the Board has jurisdiction to review on an appeal from a preliminary hearing order.¹⁰

CONCLUSION

(1) An ALJ does not have authority to award temporary partial disability compensation at a preliminary hearing. The ALJ exceeded her jurisdiction in ordering respondent to pay those benefits in the Preliminary Hearing Order.

(2) Whether claimant's Application for Preliminary Hearing was sufficient on the request for temporary partial disability compensation is rendered moot by the determination of issue No. 1.

(3) The Board does not have jurisdiction to review an ALJ's preliminary hearing determination that claimant's injury remains temporary or that claimant has not reached maximum medical improvement. The Board's review of that issue is reserved until after the entry of a final award.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders dated December 17, 2010, is reversed in part to deny claimant's request for temporary partial disability compensation at this time. The ALJ's orders concerning medical treatment and temporary total disability compensation remain in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of March, 2011.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: James B. Biggs, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Self-Insured Respondent
Rebecca Sanders, Administrative Law Judge

¹⁰ K.S.A. 44-534a(a)(2).